Supreme Court, U.S.
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No. 05-702

In The
Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as the Commissioner of the Tennessee Department Of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Tennessee law prohibits out-of-state businesses selling prescription eyewear from making space available, at their in-state stores, for state-licensed optometrists to provide eye examinations. The State, however, allows its own licensed optometrists to offer this one-stop shopping that consumers prefer by authorizing them to sell retail prescription eyewear at the same location where they provide eye examinations. The questions presented are:

1. Whether the court of appeals erred in holding, contrary to this Court's precedent and broadening a conflict in the circuits, that state discrimination disadvantaging all out-of-state businesses in favor of their primary in-state competitors is not a violation of the Commerce Clause because the businesses are not "similarly situated" even though they compete in the same retail market for the same customers.

2. Whether, in applying the balancing test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to identify violations of the Commerce Clause, a court must consider the totality of the burdens on interstate commerce, rather than only the burdens that arise because of discriminatory treatment of out-of-state competitors, an issue that has divided the courts of appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner LensCrafters, Inc. is an Ohio corporation wholly owned by Luxottica Group, S.p.A., a publicly held company, through the following intervening companies: LensCrafters, Inc., is owned by The United States Shoe Corporation, which is owned by Avant Garde Optics, L.L.C., which is owned by Arnette Optics Illusions, Inc., which is owned by Luxottica U.S. Holdings Corp., which in turn is owned by Luxottica Group, S.p.A.

Petitioner Cole Vision Corporation is a Delaware corporation wholly owned by Luxottica Group, S.p.A, a publicly held company, through the following intervening companies: Cole Vision Corporation is owned by Cole National Group, Inc., which is owned by Cole National Corporation, which is owned by Luxottica U.S. Holdings Corp., which in turn is owned by Luxottica Group, S.p.A.

Petitioners U.S. Vision and the National Association of Optometrists and Opticians have no parent corporations, and no publicly held corporation owns 10% or more of them.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 403 F.3d 798. The opinion of the district court granting respondents' motion for summary judgment (App., *infra*, 17a-84a) and an order amending that opinion (App., *infra*, 85a-89a) are reported at 248 F. Supp. 2d 705. The opinion of the Tennessee Supreme Court on certification from the district court on a relevant state law question (App., *infra*, 90a-103a) is reported at 33 S.W.3d 772.

JURISDICTION

The court of appeals entered its judgment on April 14, 2005. A petition for rehearing and rehearing *en banc* was denied on July 29, 2005. App., *infra*, 104a-105a. On October 17, 2005, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including November 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. Art. I, sec. 8, cl. 3, provides that "Congress shall have power to * * * regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Section 63-8-113(c)(6) of the Tennessee Code provides that it is unlawful for any licensed optometrist to "[p]ractice or offer to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale."

STATEMENT OF THE CASE

1. Facts

a. More than 60% of the population of the United States, including more than 90% of those over 54 years old, buy prescription eyewear, spending almost $16 billion a year on such purchases. C.A.J.A. 832-833.[1] In order to buy prescription eyewear, a person must, of course, have a prescription. In Tennessee, as in most States, a person can obtain a prescription only from a state-licensed optometrist or ophthalmologist after an eye examination. App., *infra*, 27a; C.A.J.A. 837-838, 852.

Tennessee, however, is one of a minority of States that also affords in-state businesses owned by such prescribers a significant competitive advantage in the sale of prescription eyewear. Although the sale of prescription eyewear does not constitute the provision of health care under Tennessee law, App., *infra*, 101a n.8, the state statute, § 63-8-113(c)(6), as interpreted by the Tennessee Supreme Court on certified question in this case, nonetheless allows these prescribers, and only these prescribers, to sell prescription eyewear at retail at the same location where eye examinations and prescriptions are available. App., *infra*, 101a-102a. In this way, Tennessee provides an exclusive advantage to these in-state retailers at the expense of all of their out-of-state

[1] Because the district court entered summary judgment for respondents on petitioners' Commerce Clause claim, the material facts discussed in this petition are drawn from the documentary evidence submitted by the parties in the district court with "all justifiable inferences" drawn in favor of petitioners, who were the non-movants. *Groh v. Ramirez*, 124 S. Ct. 1284, 1293 (2004). Some of the information developed in the district court is subject to a protective order because it involves trade secrets or proprietary business or financial information. Therefore, several volumes of the joint appendix filed in the court of appeals were filed under seal. This petition cites some of those materials, but does not disclose any of the protected information.

competitors who cannot sell eyewear at the same location where eye examinations and prescriptions are available.

b. Most optometrists in Tennessee take advantage of their unique opportunity under state law to operate retail prescription eyewear businesses in the same location where the optometrist performs eye examinations and issues prescriptions. C.A.J.A. 233. They hire retail employees to sell the eyewear. Those employees are not required by state law to have any special training or certification. These retail sales can account for between 40% and 60% of optometrists' revenues. App., *infra*, 35a.

By selling prescription eyewear at retail in the same location where eye examinations and prescriptions are available, Tennessee optometrist-owned businesses offer consumers "one-stop shopping." The record in this case demonstrates that consumers place a very high value on the convenience of one-stop shopping for prescription eyewear. App., *infra*, 26a-27a; C.A.J.A. 853-855.

Tennessee optometrists specifically structure their businesses to take advantage of their unique ability under state law to provide one-stop shopping. By doing so, Tennessee optometrists succeed in making retail sales of prescription eyewear to 77% to 87% of their eye examination patients who require such eyewear. C.A.J.A. 853. Tennessee optometrists design the physical layout of their businesses to facilitate the flow of a patient from the optometrist's examination room to the retail eyewear sales area. App., *infra*, 36a. During the eye examination itself, optometrists engage in selling techniques aimed at retaining their eye examination patients as customers in their retail eyewear business. For example, they recommend specific types of retail eyewear products, such as special lenses or coatings. *Ibid.* Following their examinations and prescriptions, the optometrists employ a variety of techniques to "hand off" their eye examination patients to their retail sales employees. *Ibid.* Some Tennessee optometrist-owned businesses provide their employees (including other optometrists) with commissions